Supreme Court, U.S.
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NO. 95-1863

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Petitioners

v.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE BASIS OF THE RELIEF SOUGHT BY PETITIONERS IS THE PREVAILING RATE SYSTEMS ACT AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT IMPLEMENTING THAT ACT

The Government concedes that the decision of the Court below is inconsistent with decisions from other circuits and it makes no effort to defend the decision of the Court below. (See Brief for the United States, p. 4) Instead, the Government argues that there is no basis for Petitioners' claims under the Back Pay Act. (Brief for the United States, p. 5)

The Government misconstrues the basis of Petitioners' pay claims for environmental differential pay. The Petition for Writ of Certiorari states:

> "The Petitioners and class members, like members of the bargaining unit, are 'prevailing rate employees' and, thus, are eligible under 5 U.S.C. §5341 et seq. and 5 C.F.R. §532.501 et seq. for receipt of environmental differential pay due to their exposure to asbestos." (Pet. 10)

The Prevailing Rate Systems Act, 5 U.S.C.

§5341 et seq. provides in relevant part:

> "The Office of Personnel Management, by regulation, shall prescribe practices and procedures for conducting wage surveys, analyzing wage survey data, developing and establishing wage schedules and rates, and administering the prevailing rate system. The regulations shall provide -
>
> * * * *
>
> 4) for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or usually severe hazards."

5 U.S.C. §5343(c)(4)

The pertinent regulations issued by the Office of Personnel Management state in part:

> "In accordance with section 5343(c)(4) of Title 5, United States Code, an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management." (emphasis added) 5 C.F.R. §532.511(a)(1)

The Office of Personnel Management has approved sixteen (16) categories for such payment. One of those categories is asbestos and states:

> "16. Asbestos. Working in an area where airborne concentrations of asbestos may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

Appendix "A" to 5 C.F.R. §532.501 et. seq.

In Bendure v. United States, 554 F. 2d 427, 431, 213 Ct. Cl. 633 (1977) the Court held that:

> "EDP [i.e. environmental differential pay] is a specific statutory right granted to Government employees; it grants them extra pay in those situations where the tasks of their work subjects them to inescapable environmental risk. 5 U.S.C. §5343(c) * * * *" (emphasis added)

The Court further held that:

> " . . . [I]f plaintiff can establish in a court trial that their duties involve such working conditions, the statute requires that they receive the extra pay." (emphasis added) Bendure, 557 F. 2d at 435

What the Government fails to comprehend is that just because Petitioners are not members of the bargaining unit, does not mean that they are not entitled to environmental differential pay

if they, too, were exposed to asbestos.

In Harris v. United States, 841 F. 2d 1097, 1101 (Fed. Cir. 1988) the United States Court of Appeals for the Federal Circuit held that where prevailing rate employees are members of a collective bargaining unit, they must pursue their rights to environmental differential pay under the remedies of the collective bargaining agreement (as was done by Petitioner's subordinates). However, where prevailing rate employees are not members of a collective bargaining unit, the District Court has jurisdiction of their claims for environmental differential pay.

Thus, because the Petitioners here are "prevailing rate" employees, who are not members of a collective bargaining unit, the District Court below had jurisdiction over Petitioners' claims for environmental differential pay.

CONCLUSION

For the aforegoing reasons, the Petition for Writ of Certiorari to the Court of appeals for the Third Circuit should be granted.

Respectfully submitted,

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